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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 663

WHEELING STEEL CORPORATION, A CORPORATION.
Appellant,

vs.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA.

STATEMENT AS TO JURISDICTION.

WRIGHT HUGUS,
J. E. BRUCE,
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Appellees.

STATEMENT AS TO JURISDICTION.

Wheeling Steel Corporation, appellant herein, appellant below, respectfully submits the following statement of the basis on which it contends that the Supreme Court of the United States has jurisdiction to review upon appeal a final judgment of the Circuit Court of Ohio County, West Virginia, entered in said cause on July 8, 1935, with respect to the taxation of intangible properties of appellant, its petition for Writ of Error having been timely filed in the Supreme Court of Appeals of West Virginia (the highest court of said State) and considered and denied by said Supreme Court of Appeals on September 3, 1935.

I.

Statutory Provisions Sustaining Jurisdiction.

The Federal statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Ohio County, West Virginia, on appeal, is Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (now Section 344 (a) of Title 28 of the U. S. C.), and as further amended or modified by the Acts of January 31, 1928, and April 26, 1928 (now Sections 861-a and 861-b of Title 28 of U. S. C., Sup. VI)..

II.

State Statutes Involved.

In both oral and printed argument before the state courts, the appellant herein, a corporation organized and existing under the laws of the State of Delaware, pointed out that Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, if construed by the Court to assess for taxation in and by West Virginia all of the appellant's intangible personalty, were repugnant to the provisions of Section 1 of the 14th Amendment to the United States Constitution forbidding the taking of property without due process of law.

Said Section 12, Article 3, Chapter 11, as amended by Chapter 38 of the Acts of the Legislature, 1933, Extraordinary Session, reads as follows:

> "(12) ASSESSMENT OF CORPORATE PROPERTY; REPORTS TO ASSESSOR BY CORPORATIONS.—Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in this State, except railroad,

telegraph and express companies, telephone companies, pipe line, car line companies and other public utility companies, banking institutions, national banking associations and industrial loan companies, shall annually, between the first day of the assessment year and the first day of May, make a written report, verified by the oath of the president or chief accounting officer, to the assessor of the county in which its principal office or chief place of business is situated, showing the following items, viz: (a) The amount of capital authorized to be employed by it; (b) the amount of cash capital paid on each share of stock; (c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year; (d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value; (e) the quantity, location and true and actual value of all of its real estate, and the magisterial district or districts in which it is located; (f) the kinds, quantity and true and actual value of all its tangible property in each magisterial district in which it is located.

"The oath required for this section shall be substantially as follows, viz:

STATE OF WEST VIRGINIA,
County of ——, ss:

I, —— ——, president (treasurer or manager) of (here insert name of corporation), do solemnly swear (or affirm) that the foregoing is, to the best of my knowledge and judgment, true in all respects; that it contains a statement of all the real estate and personal property, including moneys, credits and investments belonging to said corporation; that the value affixed to such property is, in my opinion, its true and actual value, by which I mean the price at which it would sell if voluntarily offered for sale on such terms as are usually employed in selling such property, and not the price which might be realized at a forced or auction sale; and said corporation has not, to my knowledge,

during the sixty-day period immediately prior to the first day of the assessment year converted any of its assets into nontaxable securities or notes or other evidence of indebtedness for the purpose of evading the assessment of taxes thereon; so help me, God.

——— ———.

"The officer administering such oath shall append thereto the following certificate, viz:

Subscribed and sworn to before me by ——— ———, this the — day of ———, 19—.

——— ———."

Said Section 13, Article 3, Chapter 11, as it appears in the Official Code of 1931, reads as follows:

"(13) Entry of Corporate Property by Assessor. —Upon receiving the verified report required by the preceding section, the assessor, if satisfied with the correctness thereof, shall assess the value of all the property of such corporation liable to taxation, and enter the same as follows, viz: All property in item (e) shall be entered with its valuation in the land books of the county, and in the magisterial district in which the real estate is situated; all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, and in the magisterial district wherein is the principal office or chief place of business of such corporation, under the appropriate heads; and all property mentioned in item (f) shall, together with its valuation, be entered in the personal property book of the county, and in the magisterial district wherein such property is on the first day of the assessment year; the property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which any such corporation shall be liable to pay taxes. If a company have branches, each branch shall be assessed separately in the county and magisterial district where its principal office for transacting its financial concerns is located; or, if there be no such office, then in the magisterial

district where its operations are carried on. All locks and dams of navigation companies shall be assessed and taxed as real estate in the county and magisterial district wherein they are situated; and in case such locks and dams are located on any creek or river which is the dividing line between counties, or the dividing line between magisterial districts of the same county, one-half of the value thereof shall be assessed in each of such counties or magisterial districts, as the case may be; when the property of an incorporated company is assessed as aforesaid, no individual shareholder therein shall be required to list or be assessed with his share, portion or interest in the capital stock of such corporation."

Appellant also contended that Section 1 of Article 5 of Chapter 11 of said Code should be considered in connection with said Sections 12 and 13 of Article 3 of Chapter 11.

Said Section 1, Article 5, Chapter 11, as amended by Chapter 40 of the Acts of the Legislature, 1933, reads as follows:

"(1) WHAT PERSONAL PROPERTY TAXABLE.—All personal property belonging to persons residing in this State, whether such property be in or out of the State, and all personal property in the State, though owned by persons residing out of the State, shall be entered in the personal property book, and be subject to equal and uniform taxation, except as classified in section four, article eight of this chapter, unless especially exempted by law; but personal property of all classes, except as hereinbefore provided, belonging to the residents of this State, which is actually and permanently located in another state, and by the laws of such other state is subject to taxation and is actually taxed in such other state, shall not be entered on the personal property book, or be taxed in this State. But the shares of capital stock owned by residents of this State in corporations actually located in other states, and whose property is taxed by the laws of such other

state, shall not be required to be listed for taxation. All moneys belonging to citizens of this State, and loaned to any person or deposited out of the State, shall be subject to taxation the same as if loaned or deposited in this State. Any person who at any time before the assessment year transfers by loan, deposit or gift, any money, notes, bonds, bills and accounts receivable, stocks and other intangible personal property, which are subject to taxation to anyone, who does not return a list of taxation as of the day on which the assessment year commences including such property, transfers, loans, deposits or gifts, if made with the intention of evading taxation, shall be deemed and treated as illegal and fraudulent and the assessor shall assess such property for taxation to the party who makes such transfers, loans, deposits or gifts as aforesaid."

Appellant likewise pointed out that said Sections 12 and 13 of Article 3 of Chapter 11 of said Code, when read in connection with Section 15 of Article 3 of Chapter 11, operated to deny to this appellant the equal protection of the laws and consequently were invalid under the provisions of said Section 1 of the 14th Amendment to the United States Constitution.

Said Section 15, Article 3, Chapter 11 as amended by Chapter 40 of the Acts of the Legislature, 1933, reads as follows:

"(15) ASSESSMENT OF CAPITAL USED IN TRADE OR BUSINESS BY NATURAL PERSONS.—The value of the capital used by any individual or firm not incorporated, in any trade or business taxable by law, shall be ascertained in the following manner: The owner, agent, or chief accountant of every such trade or business, except the business of agriculture, carried on in any county of the State, shall, annually, between the first day of the assessment year and the first day of May of the current year, make a written report as of the

first day of the assessment year, to the assessor, verified by his affidavit, showing the following matters and things, viz: (a) The amount, the true and actual value and classification of all tangible personal property used in connection with such trade or business, otherwise than such as is regularly kept for sale therein, including chattels real; (b) the true and actual value and classification of all goods and property kept for sale and remaining unsold; (c) the amount of all money derived from or belonging to such trade or business, on hand or remaining uninvested on that day, whether in or out of the State, payable to such individual or firm; (d) the amount in value of all credits arising out of any such business and remaining unpaid on that date, whether due or not, and whether in or out of the State; (e) the amount and "true and actual value of all money, notes, bonds, bills, accounts receivable, stocks and other intangible property made by such person or firm whether in or out of the State, other than those hereinbefore specified; (f) the location, quantity, the true and actual value and classification of all real estate owned by such individuals or firm and used in such trade or business. The assessor shall, upon the receipt of such report, properly verified, if he is satisfied with the correctness thereof, enter the real estate in the landbook of the county in the district wherein the same is situated, and assess the same with taxes, if not otherwise assessed, to the owner thereof; the personal property mentioned in such report he shall enter in the personal property book of his county for assessment with taxes as follows, viz: Items (a) and (b) shall be entered in the magisterial districts where they are for the greater part of the year kept or located; and items (c) and (d), (e) and (g) shall be entered under their appropriate headings, in the municipality or magisterial district wherein the principal place of business of such individual or firm is; if the assessor is not satisfied with the correctness of such report he may proceed to ascertain a correct list of the property on which such

individual or firm is liable to be assessed with taxes, and to value the same as in other cases; the person making such report shall take and subscribe an oath in substantially the following form:

I, —— ——, do solemnly swear (or affirm) that the foregoing list is true and correct to the best of my knowledge; that the value affixed to the property therein listed I believe to be the true and actual value thereof; that none of the assets belonging to (here state the name of individual or firm) and used in the business of (here describe the business) have to my knowledge, since the first day of the assessment year, been converted into nontaxable securities for the purpose of evading the assessment of taxes thereon; so help me, God.

—— ——.

"The officer administering said oath shall append thereto the following certificate, viz:

"Subscribed and sworn to before me by (here insert affiant's name) this — day of ——, 19—.

—— ——."

III.

Nature of the Case and of the Rulings of the Court.

This case was submitted on an agreed statement of facts. The questions involved are:

(1) Whether or not the appellant, which is a Delaware corporation doing business as a foreign corporation in West Virginia and other States, having its general offices in West Virginia and manufacturing plants in both West Virginia and Ohio, approximately 73% in value of its manufacturing properties, real estate and tangible personal property being located outside West Virginia and approximately 76% in value of its products during the preceding year

having been manufactured in and shipped from plants located outside West Virginia, is deprived of property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution, upon being held subject to a property tax in West Virginia upon all of its cash on deposit in banks located both within and without the State of West Virginia on January 1, 1933, including cash derived from sales of goods manufactured in and shipped from its plants in States other than West Virginia, and upon all of its accounts and notes receivable owned on that date, including those derived from shipments of material manufactured in and shipped from its plants located in other States, except upon that portion of said intangible personalty which may have been taxed in the State of Ohio.

(2) Whether or not the appellant, a Delaware corporation doing business in West Virginia and other states, is denied the equal protection of the laws, guaranteed to it by Section 1 of the Fourteenth Amendment to the United States Constitution, upon being held subject to a property tax in West Virginia upon all of its intangible personalty, except upon that portion thereof which may have been taxed in other states, in view of Section 15 of Article 3 of Chapter 11 of the West Virginia Code, *supra,* which provides that the only intangible personalty owned by an individual or unincorporated firm engaged in trade or business in West Virginia subject to the same property tax in West Virginia shall be "(c) the amount of all money derived from or belonging to" and "(d) the amount in value of all credits arising out of" the trade or business carried on in West Virginia by such individual or unincorporated firm.

This proceeding was begun in the Circuit Court of Ohio County, West Virginia, by the appellant herein, appealing pursuant to a statutory provision from an assessment for

taxation made by the Assessor of Ohio County and the State Tax Commissioner of West Virginia upon the total intangible personalty owned by the appellant on January 1, 1933. The said Circuit Court of Ohio County reduced the assessment to an amount equalling the accounts receivable derived from shipments of material manufactured by appellant in West Virginia and shipped from its West Virginia plants to customers located both within and without the State of West Virginia, plus that portion of the money deposited in West Virginia banks allocable to West Virginia business upon the same basis. From this judgment of the Circuit Court the State of West Virginia appealed to the Supreme Court of Appeals of West Virginia. In its briefs and in oral argument before said Supreme Court of Appeals this appellant urged that said Sections 12 and 13, *supra,* under which the purported assessment was made and taxes sought to be imposed were invalid not only for reasons of general law but also because they deprived this appellant of property without due process of law and denied to this appellant the equal protection of the laws, and were consequently repugnant to the provisions of Section 1 of the 14th Amendment to the United States Constitution.

Points III and IV of this appellant's Brief before the Supreme Court of Appeals of West Virginia read as follows:

> "III. If said sections direct the assessment for taxation of all the intangible personal property of this taxpayer, said sections are in contravention of Article 10, Section 1 of the Constitution of West Virginia, and deny to this taxpayer the equal protection of the laws."
>
> "IV. If the statutes of West Virginia purport to tax all the intangible personal property of this taxpayer, then said statutes are in contravention of the Fourteenth Amendment to the Constitution of the United States, for

"(A) Multiple taxation of intangibles and taxation by a state of property outside its jurisdiction are deprivations of property without due process of law.

"(B) Unless intangible personal property has acquired a business situs elsewhere, such property is taxable only at the domicile."

The Supreme Court of Appeals of West Virginia, upon consideration of said appeal, rendered its opinion, now reported in 177 S. E. 535, under the caption "In re Wheeling Steel Corporation Assessment," reversed the judgment of the Circuit Court of Ohio County, upheld the validity of the statutes involved and held that the entire business of the appellant had been so localized in West Virginia that its entire intangible property had acquired a prima facie situs for taxation in that State, stating that "there is no inhibition in the Federal Constitution against the taxation of such property by the State," and remanded the case to the said Circuit Court of Ohio County for further proceedings.

The agreed statement of facts set forth that the State of Ohio taxed intangible property of this appellant to the extent of $250,133.42 during the same tax period. The Supreme Court of Appeals of West Virginia in its opinion held that the said sum of $250,133.42 should be deducted from the agreed total intangible property owned by the appellant, that intangibles taxed by any other State should likewise be deducted, and that the remainder should be assessed for taxation in West Virginia.

In its petition for rehearing duly and timely filed in said Supreme Court of Appeals of West Virginia, this appellant urged among other things that

"(B) The statutes of West Virginia operate to deny to this taxpayer the equal protection of the laws, in contravention of the 14th Amendment to the Constitution of the United States."

and that

> "The taxation of all of taxpayer's intangibles other than those upon which a tax is paid in the State of Ohio is a taking of taxpayer's property without due process of law in contravention of the 14th Amendment to the Constitution of the United States."

Said petition for rehearing was denied on the 8th day of January, 1935. An application for appeal to the Supreme Court of the United States was presented to and denied by the Presiding Judge of the Supreme Court of Appeals of West Virginia on the 5th day of March, 1935, and was then presented to and denied by the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, on the 6th day of March, 1935, for the reason that "no final judgment is shown."

Thereafter, pursuant to said remand, further proceedings were had in said Circuit Court of Ohio County, and on July 8, 1935, the said Circuit Court entered its judgment order in conformity with the opinion and mandate of the Supreme Court of Appeals of West Virginia, aforesaid.

The appellant herein made timely application to the Supreme Court of Appeals of West Virginia for a Writ of Error to the judgment of the Circuit Court of Ohio County, again urging the federal questions aforesaid. The petition for Writ of Error was denied by the Supreme Court of Appeals of West Virginia on the third day of September, 1935, without opinion.

IV.

The Petition for Appeal.

A petition for appeal to the Supreme Court of the United States was presented to and denied by the Presiding Judge of the Supreme Court of Appeals of West Virginia on the 2nd day of November, 1935. This application is being pre-

sented to the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, on the 22nd day of Nov., 1935.

V.

The Judgment Order Entered by the Circuit Court of Ohio County is Final and Appealable under Applicable Statutes.

The Supreme Court of Appeals of West Virginia is the highest court of West Virginia in which the final order entered by the Circuit Court of Ohio County could have been reviewed. As hereinbefore stated, the said Supreme Court of Appeals denied this appellant's petition for Writ of Error filed in this case. Therefore the Circuit Court of Ohio County is the highest court of the State in which a decision could be had.

The following cases support the finality of the judgment:

Virginia Railway Company v. *Mullens,* 271 U. S. 220, 70 L. Ed. 915;

Salomon v. *State Tax Commission of New York,* 278 U. S. 484, 73 L. Ed. 464;

Western Union Tel. Company v. *Crovo,* 220 U. S. 364, 55 L. Ed. 498.

VI.

Cases Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Frick v. *Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83, 74 L. Ed. 180;

Farmers Loan and Trust Co. v. *Minnesota,* 280 U. S. 204, 74 L. Ed. 371;

Baldwin v. *Missouri*, 281 U. S. 586, 74 L. Ed. 1056;
Beidler v. *South Carolina Tax Commission*, 282 U. S. 1, 75 L. Ed. 131;
First National Bank of Boston v. *Maine*, 284 U. S. 312, 76 L. Ed. 313;
Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203, 69 L. Ed. 916;
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Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770;
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927;
Buck v. *Beach*, 206 U. S. 392, 51 L. Ed. 1106.
Blodgett v. *Silberman*, 277 U. S. 1, 72 L. Ed. 749.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now section 344 (a) of Title 28 of the U. S. C.), and as further amended or modified by the Acts of January 31, 1928 and April 26, 1928 (now sections 861-a and 861-b of Title 28 of U. S. C., Sup. VI).

Respectfully submitted,

WRIGHT HUGUS,
J. E. BRUCE,
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(7266-C)